IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Reply Memorandum in Support of Petition for a Writ of Certiorari.

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The EEOC's Memorandum in Opposition offers essentially four reasons why certiorari should be denied—none of which has merit.

First, the five Supreme Court decisions cited by the EEOC on pages 2-3 of its Memorandum for the proposition that state statutes of limitation are inapplicable to the United States or its agencies each involved an action where the government was suing as the sovereign to protect *itself* from injury. By contrast, where the government has sued to protect the rights of private citizens, state statutes of limitation have *never* before been found inapplicable. Indeed, the EEOC implicitly concedes—as it must—that no Supreme Court decision to date has *ever* found the United States government or one of its agencies to be immune from the state statute of limitations where the government

or agency was suing to collect money on behalf of private individuals—as they are in the case at bar.

Indeed, this distinction was the very foundation of the two Fifth Circuit decisions which found—contrary to the Ninth Circuit decision sought to be reviewed here—that "the most analogous" state statute of limitations was applicable to the back-pay portion of government actions under Title VII:

> "Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable. [Citing some of the same decisions the EEOC urges in the case at bar.] However, this principle is not apropos to the present back pay claims. Insofar as the pattern or practice suit [by the Attorney General under Section 707 of Title VII] constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action. [Citing the principal decision we urge in the case at bar.] These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action."
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> *United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973).

Second, while *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), certainly established the deterrent value of the back-pay remedy in the enforcement of Title VII, there is absolutely nothing in *Albemarle* to suggest that the threat of back-pay liability must or should be *interminable* in order to be effective.

Third, the EEOC's speculation that the Fifth Circuit will suddenly retreat from its position taken in two

different decisions by six different judges is pure conjecture. Petitioner is aware of no subsequent Fifth Circuit decision to date which suggests any such retreat. Furthermore, the Fifth Circuit decisions were reached after a full discussion of the significant role which back-pay awards do serve under Title VII, with language not unlike that found in *Albemarle*.[1] Thus, to deny certiorari on the rank speculation that the present unequivocal circuit split might someday disappear is simply to perpetuate the interminable delays which have obviously become a comfortable way of life for the EEOC in its enforcement of Title VII.

The EEOC's final effort to avoid the unequivocal circuit split is equally untenable. Whether the practical effect of the final resolution of the tolling issue in *Griffin Wheel* will be to permit or to bar that suit has absolutely no relevance to the propriety of resolving now the threshold issue of whether state statutes of limitations are applicable or not, for obviously one never reaches the tolling issue unless such statutes *are* applicable. Similarly, the EEOC's mere allegation that the violations are continuing—particularly in the face of the statement in the underlying charge that "October 1, 1970" was "the most recent date on which this discrimination took place"—must not divert this Court from resolving the basic issue of whether the

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[1] *United States v. Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1973):

> "Given this court's holding that '[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages properly owing to the plaintiffs' [citation omitted], it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks, not to punish the respondent [,] but to compensate the victim of discrimination."

state statute of limitations applies or not. Like the "tolling" point, the "continuing violation" issue can become relevant only after the threshold issue presented by this Petition has been resolved.

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Respectfully submitted,

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